Supreme Court, U.S.
FILED

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No. 04-

IN THE

Supreme Court of the United States

D.A.S. SAND & GRAVEL, INC.,

Petitioner,

v.

ELAINE L. CHAO, United States Secretary of Labor,
MINE SAFETY & HEALTH ADMINISTRATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Second Circuit affirmed The Mine Safety Health Administration's ("MSHA") jurisdiction over petitioner, *D.A.S. Sand and Gravel, Inc.*, based on § 4, the jurisdiction clause, of the Federal Mine Safety and Health Amendments Act of 1977 ("The Mine Act" or "the Act") Pub. L. No. 95-164, 91 Stat 1290, *codified at* 30 U.S.C. § 801, *et seq*. The agency claims Congress intended to regulate mines to the full extent of its power under the Commerce Clause even though the statutory term 'affecting . . . commerce' is clearly qualified and reads ". . . mine, the products of which enter commerce, or the operations or products of which affect commerce." Neither the Agency nor the Second Circuit give any meaning to the qualifying words "products of which" included two times, with the statutory term affecting commerce. Giving no meaning to the qualify words of the statutory term 'affecting commerce' is directly contrary to numerous recent rulings of this court.

Three questions are presented:

1. May an administrative agency, MSHA, give no meaning to words the Congress included in a statute that clearly qualify the statutory term 'affecting . . . commerce'?

2. Did Congress directly speak to the issue of its alleged intent to regulate every mine possible to the full extent of the Commerce Clause?

3. Is there a reasonable alternative interpretation of the statute that gives meaning to the qualifying words yet still authorize regulation to the extent that other parts of the statute indicate?

CORPORATE DISCLOSURE STATEMENT

Petitioner, D.A.S. Sand and Gravel, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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OPINION BELOW

The initial opinion of the United States Court of Appeals for the Second Circuit is reported at *D.A.S. Sand and Gravel, Inc. v. Elaine L. Chao, United States Secretary of Labor, et al.*, 370 F.3d 309 (2d Cir. 2004).

The opinion was amended on October 14, 2004, 386 F.3d 460 (2d Cir. 2004) (Appendix A). The Second Circuit affirmed the July 7, 2003 decision of the Federal Mine Safety and Health Review Commission, *see Secretary of Labor v. D.A.S. Sand and Gravel, Inc.*, 25 FMSHRC 364, 367 (Appendix C).

STATEMENT OF JURISDICTION

A timely petition for rehearing was denied on October 15, 2004 (Appendix D).

This Court's jurisdiction is pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution Commerce Clause.

Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290, *codified at* 30 U.S.C. § 801, *et seq.* Sec. 4. The pertinent provisions are set forth in Appendix E.

STATEMENT OF THE CASE

Respondent, Elaine L. Chao, as United States Secretary of Labor, through her agents cited and fined petitioner, D.A.S. Sand and Gravel, Inc. (DAS) for alleged regulatory violations. D.A.S. contested the citations before an Administrative Law Judge of the Federal Mine Safety and Health Review Commission ("the Commission"), claiming the Commission did not have jurisdiction over petitioner's "mine".

Respondents claim that the language of the Mine Act unambiguously expresses Congress's intent to regulate mines to the full extent of its power under the Commerce Clause. This interpretation primarily rests on the statutory term 'affecting ... commerce' found in the *Mine Act*. Those two words are qualified in the statute and the Act actually reads: (a mine) "the products of which enter commerce, or the operations or products of which affect commerce."

The thrust of respondent's argument is that the statute as a whole indicates an intent of Congress to regulate all mines to the full extent possible under the commerce clause.

Respondent Commission never gives a meaning to the qualifying words used twice by Congress in the same paragraph of the Mine Act, "the products of which ..." Respondent Commission quotes committee reports and other portions of the Mine Act, but never gives meaning to the qualifying words when it is well known and even cited by the Commission that the statutory term "affecting commerce" *unqualified* indicates an intent by Congress to regulate to the full extent of its power under the commerce clause. D.A.S. argued that by qualifying a well known statutory term, twice, in the same statute, Congress must have intended not to

regulate every Mine to the full extent of its power under the Commerce clause. D.A.S. argued an alternate jurisdictional intent that does not conflict with the other portions of the statute or committee reports cited by respondent commission.

D.A.S. contested citations issued by Respondent and in a decision dated July 7, 2003, the MSHA administrative Judge held that the Act did afford jurisdiction to MSHA. D.A.S's time petition to the Commission for discretionary review was denied, August 18, 2003. D.A.S. timely appealed to the Second Circuit Court of Appeals, which in a decision of May 26, 2004, affirmed the lower decision. D.A.S. filed a timely Petition for a Rehearing En Banc. The Second Circuit Court of Appeals denied the petition for rehearing and amended its decision on October 14, 2004.

REASONS FOR GRANTING THE PETITION

Whether qualifying language of a well known statutory term can be ignored and given no meaning is an important question. This Court in recent decisions *Jones v. United States*, 529 U.S. 848,.854 (2000) and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps. of Engineers*, 531 451, 59 (2001), (SWANCC), has stressed that even one word that qualifies the statutory term "affecting commerce" must be given "some effect."

The Second Circuit ignores this Court's requirement that when a well known statutory term such as "affecting commerce" is qualified in a statute by Congress those qualifying words must be given meaning. The Mine Act's jurisdictional clause contains the term "affecting commerce" but the term is qualified twice by the words "the products of which" Section 4 of the Mine Act, 30 U.S.C.S. § 803.

Review by this Court is necessary to confirm that agencies are not to assume that Congress intended to regulate to the full extent of its power under the commerce clause when it qualifies the well known statutory term "affecting commerce". The Second Circuit gives no meaning to the qualifying words in the Mine Act. This Court is clear that qualifying words involving such a well known statutory term must be given some meaning. The Second Circuit gives the qualifying word "products of which" no meaning or reason for their existence. *Ibid.*

Review by this court will prevent other circuits from using this case to ignore this court's directives in *Jones* and *SWANCC* that qualifying words regarding the statutory term "affecting commerce" must be given some meaning *Jones*, 854, *SWANCC* 172.

1. Review Is Warranted To Rectify A Ruling That Directly Contradicts Recent Rulings By This Court.

This Court in *Jones*, 854 and *SWANCC*, 172, has stressed the importance of one or two qualifying words in conjunction with the statutory term "affecting commerce". In *SWANCC* 172, 173, this Court stresses the need to give qualifying words meaning that avoids constitutional questions if it is not plainly contrary to the intent of Congress. The Second Circuit is in direct contradiction with this Court, by giving no meaning to the qualifying words "products of which" in the Mine Act and not considering an alternate "acceptable construction" of the statute that does not raise constitutional questions. *D.A.S. Sand & Gravel, Inc. v. Elaine L. Chao United States Secretary of Labor, et al.*, 370 F.3d 309 (2d Cir. 2004).

The Second Circuit ruling dos not give any independent meaning to the qualifying words "*products of which*" enter commerce. . . ." found in the Mine Act. The Chief Justice in *SWANCC* indicated that regarding the single word "navigatable" ". . . it is one thing to give a word limited effect and quite another to give it no effect whatsoever" *SWANCC*, 172. He further noted

> where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.

The Second Circuit ignores both of these directives of the Chief Justice. The Second Circuit gives the qualifying words "products of which" no effect whatsoever. Mine Act § 803. The Second Circuit then interprets the statute to push the limit of Congressional authority based on a senate committee report that has two interpretations, one of which does not require a constitutional question.

The Second Circuit gives no explanation as to why the words "products of which" that are in the statute and qualify the statutory term "affecting commerce" should be given no meaning or purpose an alternate meaning.

The Second Circuit also ignores an alternate meaning for the Senate Committee report language and does not explain why the alternate meaning that does not create a constitutional question should not be preferred. S. Rep. No. 96-181, at 14.

Review is appropriate so that the lower courts will give appropriate meaning to directives by this Court. The Second Circuit did not even attempt to distinguish *SWANCC*'s directives from its interpretation of the *Mine Act* and it completely ignored the importance this Court gives words that qualify the statutory term "affecting commerce", in *Jones* 854.

2. The Lower Courts Ignore The Qualifying Words Of The Statute By Using Expansive Committee Language That Clearly Has Two Possible Meanings, One Of Which Would Avoid Serious Constitutional Questions.

The Second Circuit and original Administrative Judge cite a Senate Committee's report to justify the assumption that "Congress intended to "invoke its full power under the commerce clause" *D.A.S. Sand and Gravel Inc. v. Chao*, 386 F.3d 460, 463. The committee cite does not contradict the qualifying words of the statute or appellant's interpretation of the statute; "[I]t is the Committee's intention that *what* is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation; .. ." Emphasis added, S. Rep. No. 96-181 at 14 (May 15, 1977).

What is a mine reasonably concerns the definition of the word mine. Often a mine is thought of as an underground shaft. An operation in which product is stripped from the surface is often called a quarry or pit. In fact, in Webster's New World Dictionary the first definition of the word mine ends with the phrase "distinguished from quarry." Therefore, it is reasonable to interpret the committee expansive language as meaning that they intend to regulate quarries, strip mines, as well as, mines with underground shafts. The committee's language makes no mention of also regulating every mine

no mater how small or intrastate to the full extent of its power under the commerce clause. It is far more reasonable that Congress did not want a huge international operation such as Kennecott Copper to avoid regulation by arguing it had no underground shafts. The Committee's language quoted by the Second Circuit involves "what is considered a mine" not *which* mines are to be regulated. S. Rep. This reasonable explanation of the committee's language avoids a Constitutional question.

The other statutory language cited by the Second Circuit does not contradict this interpretation; "Section 2 of the Act, why it was adopted" an urgent need to . . . improve the working conditions and practices in the Nation's coal or their mines," because "the disruption of production and the loss of income" caused by mine accidents and related illnesses "unduly impede and burden commerce". All of these economic effects are addressed by the regulation of interstate mines whose products affect commerce and does not infer the need to include every little intrastate gravel pit. Congress by clearly being expansive on its interpretation of "what is a mine" would need some restriction on *which* mines to regulate, otherwise, any commercial excavation of every kind would be subject to the *Mine Act*. Every mine subject to the *Mine Act* is required to be inspected twice a year. *Mine Act*. If that was the intent of Congress it would have employed thousands of additional agents because such an interpretation would include hundreds of thousands of farms, construction sites, highway departments, etc.

A simple and constitutional restriction on which mines are to be regulated is included in the statute "each mine . . . , the products of which affect commerce" . . . Therefore, it is reasonable to assume Congress did not intend to regulate small intrastate mines whose products are used locally such as petitioner's.

If Congress had any intent to regulate to the extent suggested by the Second Circuit it would have simply said "each mine that affects commerce", that would have indicated there desire to use the full extent of their power under the commerce clause. It did not do that. Congress qualified a well known statutory term. It is reasonable that it did.

3. The Decision Of The Second Circuit Should Be Reviewed Because It Raises Constitutional Questions That Are Not Required By The Language Of The Statute.

This Court in *SWANCC*, 173 has made it clear that constitutional questions are to be avoided if the statute allows such an interpretation. The Second Circuit approaches the Mine Act in the opposite direction. It ignores qualifying words to the statutory term "affecting commerce" and then it does not consider alternate interpretations of committee reports or other statutory language.

In its decision the Second Circuit does not explain why it reads the committee's language "what is a mine" to include *which* mine. S. Rep No. 96-181 at 14. An expressed desire to have an expansive interpretation of "what is a mine" does not contradict simultaneous desire to restrict *which* of the mines to regulate. That more restriction language is clearly included in the statute's Section 803 "Mines subject to Coverage. Each coal or other mine, the *products of which* enter commerce .. ." (Emphasis Added).

The Second Circuit contradicts this court in *SWANCC* by failing to consider, never less give preference to the alternate interpretation offered by petitioner, D.A.S. Sand and Gravel, Inc., that does not raise Constitutional Questions.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED MAY 26, 2004 AND AMENDED OCTOBER 14, 2004

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 03-40668

D.A.S. SAND & GRAVEL, INC.,

Petitioner,

v.

Elaine L. CHAO, United States Secretary of Labor, Mine Safety and Health Administration, and Federal Mine Safety and Health Review Commission,

Respondents.

Argued: May 10, 2004

Decided: May 26, 2004

Amended: October 14, 2004

Before: FEINBERG, MESKILL, and CABRANES, Circuit Judges.

PER CURIAM.

The principal questions presented by this appeal are (1) whether, in enacting the Federal Mine Safety and Health

Appendix A

Amendments Act of 1977 ("the Mine Act" or "the Act"), Pub.L. No. 95-164, 91 Stat. 1290, codified at 30 U.S.C. § 801 *et seq.*, Congress intended to regulate mines like that operated by petitioner, the products of which are sold only to intrastate purchasers; and (2) if so, whether Congress has the authority under the Commerce Clause to regulate such mines.

BACKGROUND

The Mine Act charges the Secretary of Labor with promulgating mandatory safety and health standards for the nation's mines and enforcing those standards by means of regular inspections. *See* 30 U.S.C. § § 811, 813. Section 4 of the statute provides that regulations promulgated by the Secretary of Labor under the Act apply to "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce. . . ." *Id.* § 803. The Act defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States. . . ." *Id.* § 802(b).

After inspectors of the Mine Safety and Health Administration within the Department of Labor inspected the mine operated by petitioner D.A.S. Sand & Gravel, Inc. ("DAS") and cited it for several regulatory violations under the Act, DAS contested the citations before an Administrative Law Judge of the Federal Mine Safety and Health Review Commission ("the Commission").[1]

1. The Federal Mine Safety and Health Review Commission is an adjudicatory body independent of the Department of Labor that (Cont'd)

Appendix A

DAS argued primarily that Section 4 of the Act does not apply to mines like that operated by DAS—a New York mine the products of which are undisputedly sold only to purchasers within the State of New York. *See Secretary of Labor v. D.A.S. Sand & Gravel, Inc.*, 25 FMSHRC 364, 367 (July 7, 2003) ("*D.A.S.*"). The administrative law judge rejected DAS's argument that DAS's mine is not subject to regulation under the Mine Act, *see id.* at 367-69, and DAS's subsequent petition to the Commission for discretionary review[2] was denied on August 18, 2003. DAS timely appealed to our Court pursuant to Section 106 of the Mine Act, 30 U.S.C. § 816, which provides us with jurisdiction to review decisions of the Commission.

(Cont'd)

adjudicates claims challenging the Department of Labor's enforcement of the Mine Act. *See* 30 U.S.C. § 823; *see also Ingalls Shipbuilding, Inc. v. Dir., Office of Workers' Comp. Programs, Dep't of Labor*, 519 U.S. 248, 267-68, 117 S.Ct. 796, 136 L.Ed.2d 736 (1997); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 204, 114 S.Ct. 771, 127 L.Ed.2d 29 (1994).

2. The Act provides that an aggrieved party may seek a second level of review from the Commission after an initial adverse decision, but that such a second review is discretionary. 30 U.S.C. § 823(d). Unless a petition for discretionary review has been granted, the original administrative law judge's decision becomes a final decision of the Commission forty days after its issuance. *Id.*

Appendix A

DISCUSSION

I. Congressional Intent

DAS argues, first, that the Commission misinterpreted the Mine Act by holding that the Act applies to mines the products of which are sold entirely intrastate, such as the mine operated by DAS. Petitioner claims that, because the Act defines "commerce" as occurring "among the several States . . . ," *id.* § 802(b), and DAS, the operator of a New York mine, sells the mine's products entirely within the State of New York, the mine operated by DAS does not qualify as a mine "the products of which enter commerce, or the operations or products of which affect commerce," *id.* § 803.

When we review an agency's interpretation of a statute, we must first determine "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). If Congress has spoken unambiguously, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43, 104 S.Ct. 2778. In determining whether a particular provision is unambiguous, we consider "the particular statutory language at issue, as well as the language and design of the statute as a whole, and where appropriate, its legislative history." *Natural Resources Defense Council v. Abraham*, 355 F.3d 179, 198 (2d Cir.2004) (internal quotation marks and citation omitted) (interpreting the Energy Policy and Conservation Act, as amended by the National Appliance Energy Conservation Act). In the instant case, all three of

these factors—the language of Section 4, the language and design of the Mine Act as a whole, and the Act's legislative history—lead us to conclude that the language of Section 4 of the Mine Act unambiguously expresses Congress's intent to regulate mines to the full extent of its power under the Commerce Clause.

Turning first to the plain language of the statute, it is well established that "the statutory term 'affecting ... commerce,' ... when unqualified, signal[s] Congress' intent to invoke its full authority under the Commerce Clause." *Jones v. United States*, 529 U.S. 848, 854, 120 S.Ct. 1904, 146 L.Ed.2d 902 (2000); *see also Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003) (reaffirming in an opinion interpreting the Federal Arbitration Act that the "familiar term 'affecting commerce' " consists of "words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power"); *accord United States v. Lake*, 985 F.2d 265, 267-68 (6th Cir.1993) (holding that the language of the Mine Act, its broad remedial purpose, and its legislative history establish that Congress intended to exercise its full power under the Commerce Clause); *Marshall v. Kraynak*, 604 F.2d 231, 232 (3d Cir.1979) (stating that "[i]n enacting [Section 4 of the Mine Act], Congress intended to exercise its authority to regulate interstate commerce to 'the maximum extent feasible through legislation' ") (citation omitted).

The language and design of the Mine Act as a whole support our interpretation of Section 4. In Section 2 of the Act, Congress articulated findings that led to the Act's adoption, including "an urgent need to ... improv[e] the

working conditions and practices in the Nation's coal or other mines," because "the disruption of production and the loss of income" caused by mining accidents and mining-related illnesses "unduly impede[] and burden[] commerce." 30 U.S.C. § 801(c), (f). Moreover, Congress found that "the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the growth of the coal or other mining industry. . . ." *Id.* § 801(d). The Supreme Court has stated that "[t]hese congressional findings [contained in the preamble to the Mine Act] were based on extensive evidence showing that the mining industry was among the most hazardous of the Nation's industries." *Donovan v. Dewey*, 452 U.S. 594, 602 n. 7, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1981) (citing evidence contained in the legislative history of the Act).

These provisions support the position of the administrative law judge that the Act evinces Congress's intent "to regulate the business of mining because of the nature of mining activity and not because of the business economics that determine the geographic service area of a particular mine." *D.A.S.*, 25 FMSHRC at 369. Accordingly, these provisions provide no support for DAS's argument, *see* Petitioner's Br. at 10, that Congress, in adopting the Mine Act, did not intend to regulate mines like that operated by D.A.S.

Finally, the legislative history of the Mine Act corroborates our interpretation of Section 4. The Senate Report accompanying the bill that would become the Mine Act reads, in relevant part:

> [I]t is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S.Rep. No. 95-181, at 14 (May 15, 1977), *reprinted in* 1997 U.S.C.C.A.N. 3401, 3414.

Accordingly, having considered "the particular statutory language [of Section 4], as well as the language and design of the statute as a whole, and . . . the legislative history," *Abraham*, 355 F.3d at 198, we conclude that Section 4 unambiguously indicates that Congress intended to regulate mines to the full extent of its power under the Commerce Clause.

II. Commerce Clause Power

Because we hold that Congress *intended* to regulate mines to the full extent of its authority under the Commerce Clause, we turn now to the question whether the Commerce Clause *permits* Congress to regulate DAS's mine - whose products are sold entirely intrastate.

Petitioner argues that regulation of mines the products of which are sold entirely intrastate is beyond the power of Congress under the Commerce Clause. However, the Supreme Court has long held that the Commerce Clause does not preclude Congress from regulating the activities of an

economic actor whose products do not themselves enter interstate commerce, where the activities of such local actors taken together have the potential to affect an interstate market the regulation of which is within Congress's power. *See Wickard v. Filburn*, 317 U.S. 111, 127-28, 63 S.Ct. 82, 87 L.Ed. 122 (1942); *see also Fry v. United States*, 421 U.S. 542, 547, 95 S.Ct. 1792, 44 L.Ed.2d 363 (1975) ("Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States. . . ."). No one disputes Congress's power to regulate the mining industry under the Mine Act. Accordingly, just as in *Wickard* a farmer who grew wheat solely for personal consumption was subject to regulations applicable to the nationwide wheat market, *see Wickard*, 317 U.S. at 127-28, 63 S.Ct. 82, the mine operated by DAS is subject to the regulations imposed on the mining industry under the Mine Act. *See Lake*, 985 F.2d at 269 ("Even if the coal production at defendant's mine was small and sales were entirely local, under the Supreme Court's holdings in *Wickard* and *Fry*, defendant's efforts are deemed to affect interstate commerce, since such small efforts, when combined with others, could influence interstate coal pricing and demand."). Because we hold that the Commerce Clause allows Congress the authority to regulate DAS's mine, and because we hold that Congress intended to wield its regulatory authority to the full extent provided it by the Commerce Clause, the mine is within the scope of Section 4 of the Mine Act, and is therefore subject to regulations promulgated by the Secretary of Labor.

Appendix A

CONCLUSION

In conclusion, we hold (1) that Section 4 of the Mine Act unambiguously expresses Congress's intent to regulate the mining industry to the full extent of its power under the Commerce Clause, and (2) that Congress's power under the Commerce Clause includes the power to regulate mines whose products are sold entirely intrastate, such as that operated by DAS. Accordingly, we affirm the Decision of the Federal Mine Safety and Health Review Commission.

APPENDIX B — NOTICE OF THE FEDERAL MINE AND HEALTH REVIEW COMMISSION DATED AUGUST 18, 2003

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

August 18, 2003

Docket Nos. YORK 2001-67-M
YORK 2002-30-M
YORK 2002-59-M
YORK 2003-11-M

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA,
on behalf of ANDREW J. GARCIA,

Petitioner

v.

D.A.S. SAND & GRAVEL,

Respondent

NOTICE

On August 4, 2003, a petition for discretionary review was filed by D.A.S. Sand and Gravel with the Federal Mine Safety and Health Review Commission under section 113(d)(2) of the Federal Mine Safety and Health Act of 1977,

30 U.S.C. § 801 *et seq.* at § 823(d)(2). That section provides that review of a decision of an Administrative Law Judge may be granted upon specified grounds and upon the affirmative vote of two Commissioners. Such review is discretionary. 30 U.S.C. § 823(d)(2)(A). However, no two members of the Commission voted to grant the petition or otherwise order review under 30 U.S.C. § 823(d)(2)(B). Consequently, the decision of the Administrative Law Judge is final as of 40 days after its issuance. 30 U.S.C. § 823(d)(1).

s/ Jean H. Ellen
Jean H. Ellen
Chief Docket Clerk

APPENDIX C — DECISION OF THE FEDERAL MINE AND HEALTH REVIEW COMMISSION DATED AUGUST 18, 2003

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

July 7, 2003

CIVIL PENALTY PROCEEDINGS

Docket No. YORK 2001-67-M
A.C. No. 30-03254-05508

Docket No. YORK 2042-59-M
A.C. No. 30-03254-05510

Docket No. YORK 2002-30-M
A.C. No. 30-03254-45509

Docket No. YORK 2003-1 2003-11-M
A.C. No. 30-03254-05511

D.A.S. Sand & Gravel

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, MSHA,
on behalf of ANDREW J. GARCIA,

Petitioner

v.

D.A.S. SAND & GRAVEL,

Respondent

Appendix C

DECISION

Before: Judge Schroeder

These cases are before me on Petitions by the Secretary for the assessment of Civil Penalties for the alleged violation of mine safety regulations. The cases were consolidated without opposition in the interest of economical adjudication. A hearing was held in Rochester, New York, on April 23, 2003. Both sides were given an opportunity to submit written argument on the legal and factual issues raised at the hearing. After giving the record and the several presentations of counsel careful consideration, I make the following findings and conclusions:

Factual Findings

Jurisdiction

D.A.S. Sand and Gravel is a small business engaged in the extraction of sand and gravel from a native deposit for sate to the general public. David Scheer has been the owner, president and chief executive since 1998. It is not disputed that D.A.S. has sold sand and gravel only to buyers within New York State although purchasers may have used the materials for purposes with multi-state consequences, e.g., road construction. Equipment used in the business has been purchased from suppliers in other states.

An essential element of the D.A.S. operation is the use of a front-end loader. A loader is used to remove native materials and transport them to a sorter. After the sorted

material is moved to stockpiles by belt, a loader is used to move material from an appropriate stockpile to a buyer's truck. At least three front-end loaders in various mechanical condition were identified in the record as used by D.A.S. The majority of the citations issued by MSHA in these cases involve mechanical defects alleged to be present in the front-end loaders.

An MSHA inspector visited the Respondent's business on two occasions relevant to these cases, September 19, 2000, and November 8, 2001. There was no apparent change in the way the business was conducted between those two dates. Respondent does not claim any significant changes in the period since the last inspection.

Citations

The facts regarding specific alleged violations of mine safety regulations can be best grouped by business function. The allegations concern (1) front-end loaders, (2) handrails, (3) electric faults, (4) guards, and (5) record keeping. Respondent's evidence was directed more to the potential significance of the violations than to the actual occurrence of a violation.

(1) Front-end loaders

Of the fifteen (15) citations at issue, nine deal with some aspect of the front-end loaders used by the Respondent. Three citations, 7724561, 7741669, and 7741667 allege that back-up alarms were not functional. Back-up alarms are the noise- makers that are intended to alert people other than the

driver that the vehicle is in reverse and the driver is probably unable to clearly see the immediate area behind the vehicle. The MSHA inspector, William Korbel, testified that he observed the vehicles in operation backing up and did not hear a back-up alarm. He also testified the vehicles constitute a very significant safety risk to other persons in the area, both those on foot and those in other vehicles. It was his opinion that the operator was at risk even in low speed impacts to other vehicles because of the persistent failure to wear seat belts. Mr. Scheer testified to facts intended not to dispute the violations (failure to have working backup alarms) but to lessen the perceived risk of injury. He testified the business is small. The customers are usually repeat buyers that are familiar with the operations that involve the front-end loaders. People do not wander around the grounds on foot, but stay in the truck they drove to pick up sand or gravel. Mr. Scheer did not deny knowing the regulatory requirement for a back-up alarm.

Four citations, 7724562, 7724564, 7724574, and 7741668, deal with the brakes on the front-end loaders, either the parking brakes or the services brakes. Mr. Korbel testified he observed the vehicles, had operating tests performed on both level ground and inclines, and found serious defects in the brakes. Mr. Scheer testified to facts which he believed minimized the likelihood of injury from inadequate brakes. He testified most of the work with front-end loaders is performed on level ground at very low speeds by people familiar with the operation. It was his opinion that the weight of the machines made stopping the engine an effective braking technique. He did concede that some ramps and inclines are part of the area used by the frontend loaders. He also conceded that the area is sometimes wet and slick.

Appendix C

Two Citations, 7741666 and 7724560, deal with the failure to use seat belts in operating the front-end loaders. Mr. Korbel testified that on his first visit to D.A.S. in September 2000, the seat belts were stuffed under the seat to keep them out of the way. A similar scene greeted him on his return in October 2001. Mr. Scheer did not dispute the failure to wear seat belts, but merely testified as to the slow speeds in limited circumstances in which the vehicles were operated as lessening the likelihood of injury from failure to wear seat belts. He did not dispute his knowledge of the regulatory requirement to use seat belts.

(2) Hand Rails

One citation, 7724567, was issued for failure to have adequate handrails on an elevated catwalk. A slack rope was draped across an opening of approximately twenty-five feet. The deck was more than ten feet in the air. Workers were required to be on the deck on a regular basis for service of the sorter. Mr. Korbel testified the rope was more of a tripping hazard than a safety aid for people working on the deck. Mr. Scheer testified he was instructed to use a rope by a MSHA inspector, whose name he could not recall. He testified the risks of injury were small because the deck is used only for short periods of time by people familiar with the location.

(3) Electric Faults

Two citations, 7724568 and 7724570, were issued for electrical problems. One citation involved the alleged failure to include adequate circuit overload protection in the sorter motor circuits. The other citation involved an alleged failure

to perform and document ground resistance or continuity tests of the sorter electrical circuits. Mr. Korbel testified the lack of circuit overload protection presented a risk of fire. The lack of testing of the circuits, in his opinion, made monitoring of the adequacy of electrical protection very difficult, and hence, the prevention of serious shock hazards was made more difficult. The electric current levels are sufficient to cause serious injury or death if shock hazards are not avoided. Mr. Scheer testified the electric circuits were created by a qualified electrical contractor familiar with MSHA requirements. He denied instructing the contractor to omit necessary, but expensive, components in the circuits. He attempted to articulate a theory under which ground resistance or continuity tests were unnecessary. He claimed extensive knowledge of electrical circuits and their hazards because of work experience prior to owning a sand and gravel facility. I found his testimony confusing and unpersuasive.

(4) Guards

Two citations, 7741670 and 7741671 were issued for failure to maintain guards on the conveyer belt tail pulleys. Mr. Korbel testified the tail pulleys were at a working level and had exposed pinch points that presented a significant risk of injury to hands and feet of workers. Mr. Scheer did not dispute the lack of guards at the time of inspection and merely testified as to the small number of persons exposed to the risk because of the small size of his business.

Appendix C

(5) Record Keeping

One citation, 7741672, was issued for failure to maintain records of ordering parts to correct previously identified safety risks. Mr. Scheer did not testify as to any reason for failure to maintain the necessary records.

Legal Conclusions

The legal issues in these cases divide easily into two groups: (1) those associated with the jurisdiction of the Secretary over the activities of D.A.S., and (2) those associated with the obligation of the Secretary to provide evidence of particular violations of mine safety regulations with an appropriate sanction. Unless the Secretary is successful on the first issue, the second issue need not be decided.

Jurisdiction

In contesting jurisdiction of the Secretary, D.A.S. argues it does not operate a "mine" as that term is used in the Mine Safety Act. D.A.S. contends its products are not introduced into interstate commerce as required under the Act.[1] Mr. Scheer testified the essential economic realities of transportation costs compared to value make it impossible for a sand and gravel pit to sell to buyers more than

1. Section 4 of the Federal Mine Safety & Health Act of 1977 provides "[e]ach coal or other mine, the products of which enter commerce, or the operations of products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.

a relatively short distance from the material source. The location of the D.A.S. source, goes the argument, makes it economically impossible for any of its product to cross a state line.

With one exception noted below, all of the Respondent's arguments were raised and answered in favor of jurisdiction in the Secretary in the case of *Secretary of Labor v. Tide Creek Rock, Inc.*, 24 FMSHRC 210 (February 2002). *Tide Creek* involved a small, family-run, crushed stone operation quite similar to the D.A.S. facility. Judge Barbour specifically noted:

> It is true that Tide Creek is small and most of its product is sold locally. However, even under these circumstances, it has been found that interstate commerce is affected because of the cumulative effect small scale operation can have in interstate pricing and demand.

D.A.S. attempts to avoid the effect of this and similar cases over the years by relying on a recent decision of the Supreme Court in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2003), which involved the use of an abandoned sand and gravel pit for a municipal waste dump. The Supreme Court overturned the position of the Corps of Engineers on the requirement for a permit under the Clean Water Act to allow the filling of the abandoned pit. The language used by the Supreme Court is enticing. Chief Justice Rehnquist discusses limitations on federal power under the Commerce Clause of the Constitution in terms that suggest the Court intends a retreat from prior

holdings on the limits of this power. But a careful reading of the case leads to the conclusion the decision was not intended to limit authority of the federal government such as that exercised by the Secretary in this case.

The Supreme Court was faced with the question of whether the jurisdictional definition in the Clean Water Act of "navigable waters of the United States" included the ponds which remained after the abandonment of a sand and gravel pit. The Corps of Engineers argued that the regular use of those ponds by migratory birds supplied a Commerce Clause nexus sufficient for Congress to exercise power to regulate the use of the ponds. Chief Justice Rehnquist responded that the hypothetical limits of the power of Congress were not at issue. At issue were the actual limits of the exercise of the power of Congress with respect to the gravel pit ponds. On this issue the Chief Justice replied that Congress has not expressed an intent to exercise its power over the ponds, assuming it had power to exercise. The opinion is actually limited to a interpretation of the statutory language of the Clean Water Act. Chief Justice Rehnquist specifically notes that the potential constitutional issue is not being decided in this case.

Nothing in the *Solid Waste* decision would inhibit Congress from exercising Commerce Clause power over health and safety in small sand and gravel pits. The question is whether it chose to exercise that power. The legislative history of the Mine Safety Act is very different from the Clean Water Act on the issue of congressional intent to occupy the field.

Appendix C

The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et.seq.*, was passed after a series of mine disasters had illustrated the need for consistent and uniform standards for the mining industry that would be enforced at the federal level. Attempts to secure adequate state enforcement of health and safety standards had been unsuccessful, with some states doing more than others. The Congress, in passing the Mine Safety Act, specifically noted that the business of extracting minerals from the earth is an inherently dangerous activity that must be carefully administered if it is to serve the needs of both customers and employees. To assure that consistent and uniform standards and practices would be implemented, Congress included in the Mine Safety Act a very broad definition of a mine. The Senate Committee which drafted the bill that became the Mine Safety Act noted "it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intention of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act." *U.S. Code Congressional and Administrative News 1977*, 3401, 3414. This legislative intent was early recognized and implemented by the courts. *United States v. Lake*, 985 F.2d 265 (C.A. 6, 1993), *Marshall v. Kravnak*, 604 F.2d 231 (C.A. 3, 1979)

It is clear to me that Congress intended to regulate the business of mining because of the nature of mining activity and not because of the business economics that determine the geographic service area of a particular mine. For the purpose of this case, I conclude that Congress exercised sufficient authority under the Commerce Clause of the

Constitution to make the Respondent's sand and gravel business subject to regulation by the Mine Safety and Health Administration and this Commission.

Citations

In evaluating the claims by the Secretary, my responsibility is to follow a two-step process: (1) determine whether a regulation was violated, and (2) determine the appropriate penalty for any violations under the criteria in Section 110(i) of the Mine Safety Act. *Secretary of Labor v. Lexicon, Inc.*, 24 FMSHRC 1014, 1029 (Nov. 2002). D.A.S. is a small company with no established history of prior violations, but which has not established a practice of good faith efforts to abate violations or correct safety problems. The Respondent made no attempt to show that its financial condition is such that payment of any particular level of Civil Penalty would endanger its ability to stay in business.

(1) Front-end Loaders

In Citations 7724561, 7741669, and 7741667, Respondent is alleged to have violated 30 C.F.R. §56.14132, which provides:

> *(b) (1) When the operator has an obstructed view to the rear, self-propelled mobile equipment shall have - (i) An automatic reverse-activated signal alarm;*

This regulation was violated. The front-end loaders must be equipped with a functioning back-up alarm. It is a

mandatory safety standard. It was known by the Respondent to be a mandatory safety standard. Because of the setting in which operations occurred, the gravity of the violation is moderate. Because of the Respondent's size, I consider the penalties proposed by the Secretary to be excessive. I find the appropriate penalty, after consideration of all the statutory criteria, to be $600.00 for the three Citations.

In Citations 772462, 7724564, 7724574, and 7741668, Respondent is alleged to have violated 30 C.F.R. §56.14101(a)(1) which provides:

> *(1) Self-propelled mobile equipment shall be equipped with a service brake system capable of stopping and holding the equipment with its typical load on the maximum grade it travels.*

This regulation was violated. The front-end loaders must be equipped with functioning brakes that make it possible for the operator to stop a loaded vehicle on a ramp within a reasonable distance. This regulation seems such an obvious mandatory safety standard that the Respondent must be presumed to have been aware of the requirement. Because of the setting in which operations occurred, the gravity of the violation is moderate. Because of the Respondent's size, I consider the penalties proposed by the Secretary to be excessive. I find the appropriate penalty, after consideration of all the statutory criteria, to be $1,000.00 for the three Citations.

Appendix C

In Citations 7741666, and 7724560, Respondent is alleged to have violated 30 C.F.R. §56.14130(g), which provides:

> *(g) Seat belts shall be worn by the equipment operator except that when operating graders from a standing position, the grader operator shall wear safety lines and a harness in place of a seat belt.*

This regulation was violated. The operators, including the owner and supervisor, regularly failed to wear seat belts in the front-end loader. This regulation was known to the supervisor and operators. Because of the low speeds involved in the setting in which operations occurred, the gravity of the violation is minimal. Because of the Respondent's size, I consider the penalties proposed by the Secretary to be excessive. I find the appropriate penalty, after consideration of all the statutory criteria, to be $200.00 for the two Citations.

(2) Hand Rails

In Citation 7724567, Respondent is alleged to have violated 30 C.F.R. §56.11002, which provides:

> *Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition.*

This regulation was violated. The catwalk was not provided with a substantial handrail in place of a designating

rope. There is a reasonable dispute as to Respondent's knowledge of this requirement, and the gravity of the violation is minimal. Because of the Respondent's size, I consider the penalties proposed by the Secretary to be excessive. I find the appropriate penalty, after consideration of all the statutory criteria, to be $50.00.

(3) Electric Faults

In Citation 7723568, Respondent is alleged to have violated 30 C.F.R. §56.12001, which provides:

> *Circuits shall be protected against excessive overload by fuses or circuit breakers of the correct type and capacity.*

This regulation was violated. The motor circuits did not include protection against overload in the form or either fuses or circuit breakers. Respondent claimed to have relied upon a qualified electrician in the creation of the circuits. Mr. Scheer claimed, on the other hand, to be knowledgeable on the subject of electrical circuits. The need for overload protection seems so clear as to make it impossible to claim ignorance of the requirement. Mr. Scheer did not claim ignorance but, rather, claimed the equivalent safety factor was provided by other means. His explanation of the other means was unpersuasive. Because of the Respondent's size, I consider the penalties proposed by the Secretary to be excessive. I find the appropriate penalty, after consideration of all the statutory criteria, to be $50.00.

Appendix C

In Citation 7724570, Respondent is alleged to have violated 30 C.F.R. §56.12028, which provides:

> *Continuity and resistance of grounding systems shall be tested immediately after installation, repair and modification; and annually thereafter. A record of the resistance measured during the most recent tests shall be made available on a request by the Secretary or his duly authorized representative.*

This regulation was violated. Respondent was quite candid in testifying that the testing was not performed so a record could not be maintained. Mr. Scheer testified as to various theories of electric circuits under which such information would not be required. His testimony on this subject was unpersuasive. No electrical injuries have been sustained in the Respondent's business. Because of the Respondent's size, I consider the penalties proposed by the Secretary to be excessive. I find the appropriate penalty, after consideration of all the statutory criteria, to be $50.00.

(4) Guards

In Citations 7741670 and 7741671, Respondent is alleged to have violated 30 C.F.R. §56.14107, which provides:

> *(a) Moving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, coupling, shafts, fan blades and similar moving parts that can cause injury.*

This regulation was violated in both instances. The conveyer belt pulleys contain pinch points that can cause injury to people moving in the area. Respondent made no claim the pulleys were guarded, but merely attempted to minimize the risk because of the small number of people exposed to the unguarded machinery. I find the appropriate penalty, after consideration if all the statutory criteria, to be $250.00.

(5) Record Keeping

In Citation 7741672, Respondent is alleged to have violated 30 C.F.R. §56.14100(d), which provides:

> *(d) Defects on self-propelled mobile equipment affecting safety, which are not corrected immediately, shall be reported to and recorded by the mine operator. The records shall be kept at the mine or nearest mine office from the date the defects are recorded until the defects are corrected. Such records shall be made available for inspection by an authorized representative of the Secretary.*

This regulation was violated. The testimony indicates records were not kept of either brake or back-up alarm malfunctions, and this failure was the reason why records were not produced at the request of the MSHA inspector. I find the appropriate penalty, after consideration of all the statutory criteria, to be $200.00.

Appendix C

Summary

It is my conclusion that the Respondent has violated a variety of mine safety regulations, perhaps in part motivated by his strongly held conviction as to his legal position, with serious consequences for the health and safety of his employees and customers. The total Civil Penalty appropriate to redress these violations is $2,400.00.

ORDER

The Respondent is directed to pay a Civil Penalty of $2,400.00 within 40 days of the date of this Order. The parties are to bear their own costs.

s/ Irwin Schroeder
Irwin Schroeder
Administrative Law Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED OCTOBER 15, 2004

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York 10007

Roseann B. MacKechnie
Clerk

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 15th day of October two thousand four.

D.A.S. SAND & GRAVEL, INC.,

Petitioner,

v.

ELAINE L. CHAO, United States Secretary of Labor,
MINE SAFETY & HEALTH ADMINISTRATION,

Respondents.

A petition for rehearing and a petition for rehearing en banc having been filed herein by the petitioner DAS Sand & Gravel, Inc.

Appendix D

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk

By: [illegible]
Motion Staff Attorney

APPENDIX E — STATUTES INVOLVED

30 USCS § 801. Congressional findings and declaration of purpose

Congress declares that—

(a) the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner;

(b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines cause grief and suffering to the miners and to their families;

(c) there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines;

(d) the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines is a serious impediment to the future growth of the coal or other mining industry and cannot be tolerated;

(e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;

(f) the disruption of production and the loss of income to operators and miners as a result of coal or other mine accidents or occupationally caused diseases unduly impedes and burdens commerce; and

(g) it is the purpose of this chapter (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health and Human Services and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners; (2) to require that each operator of a coal or other mine and every miner in such mine comply with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal or other mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal or other mining industry, research and development and training programs aimed at preventing coal or other mine accidents and occupationally caused diseases in the industry.

30 USCS § 803. Mines subject to coverage

Each coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act.

(2)

Supreme Court, U.S.
FILED
APR 22 2005
OFFICE OF THE CLERK

No. 04-978

In the Supreme Court of the United States

D.A.S. SAND & GRAVEL, INC., PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Section 4 of the Federal Coal Mine Health and Safety Act of 1969 (Mine Act), 30 U.S.C. 803, provides that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this chapter." The question presented is whether the Mine Act applies to petitioner's sand and gravel mine, the products of which are sold exclusively to intrastate customers.

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In the Supreme Court of the United States

No. 04-978

D.A.S. SAND & GRAVEL, INC., PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, as amended (Pet. App. 1a-9a), is reported at 386 F.3d 460. The notice of the Federal Mine Safety and Health Review Commission denying the petition for discretionary review of the administrative law judge's decision (Pet. App. 10a-11a) is unreported. The decision and order of the administrative law judge (Pet. App. 12a-28a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 26, 2004. A petition for rehearing was denied on October 15, 2004 (Pet. App. 29a-30a). The petition for a writ of certiorari was filed on January 4, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Coal Mine Health and Safety Act of 1969 (Act or Mine Act), 30 U.S.C. 801 *et seq.*, was enacted to improve safety and health in the Nation's mines. 30 U.S.C. 801. The Act authorizes the Secretary of Labor to promulgate mandatory safety and health standards and to enforce those standards through regular mine inspections. 30 U.S.C. 811, 813. Section 4 of the Act provides that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this chapter." 30 U.S.C. 803. The Act defines "commerce" as "trade, traffic, commerce, transportation, or communication among the several States." 30 U.S.C. 802(b).

2. Petitioner D.A.S. Sand & Gravel, Inc., operates a mine at which it extracts sand and gravel for sale to the general public. Pet. App. 13a.[1] In September 2000 and November 2001, investigators from the Department of Labor's Mine Safety and Health Administration (MSHA) inspected petitioner's mine and issued citations for multiple violations of Mine Act safety standards. *Id.* at 14a-18a (describing citations). Petitioner contested the citations, asserting both that the violations were not serious in nature and that its mine was not covered by the Act because its products are not sold in interstate commerce, as required by Section 4 of the Act. *Id.* at 18a.

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[1] Section 3(h)(1)(A) of the Act defines a "mine" as, among other things, "an area of land from which minerals are extracted in nonliquid form." 30 U.S.C. 802(h)(1)(A). Petitioner does not dispute that its sand and gravel operation is a "mine" within the meaning of Section 3(h).

After a hearing, the administrative law judge (ALJ) affirmed the citations on the merits and rejected petitioner's contention that its mine is not covered by Section 4. Pet. App. 12a-28a. The ALJ found that petitioner sells its products, sand and gravel, only to intrastate buyers. *Id.* at 13a. He also stated, however, that purchasers may have used the products for "purposes with multi-state consequences, *e.g.*, road construction," and that equipment used in the operation "has been purchased from suppliers in other states." *Ibid.* The ALJ held that, even if petitioner's mine is a small operation whose products are sold locally, it affects interstate commerce because of the cumulative effect that small scale operations have on interstate pricing and demand. *Id.* at 19a (citing and quoting *Secretary of Labor* v. *Tide Creek Rock, Inc.*, 24 F.M.S.H.R.C. 201 (2002)).

The ALJ rejected petitioner's argument that this Court's decision in *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), compels a narrow interpretation of Section 4 of the Mine Act. Pet. App. 19a-20a. The ALJ concluded that the Mine Act "is very different from the Clean Water Act," which was at issue in *SWANCC*, "on the issue of congressional intent to occupy the field," *id.* at 20a, and that the Mine Act's broad definition of a mine and its legislative history show that "Congress intended to regulate the business of mining because of the nature of mining activity and not because of the business economics that determine the geographic service area of a particular mine." *Id.* at 21a. Accordingly, the ALJ concluded that "Congress exercised sufficient authority under the Commerce Clause of the Constitution to make [petitioner's] sand and gravel business subject to regulation" under the Act. *Id.* at 21a-22a.

The ALJ assessed $2400 in penalties for petitioner's violations. Pet. App. 28a, and petitioner sought discretionary review by the Federal Mine Safety and Health Review Commission. The Commission denied the petition, *id.* at 10a-11a, and accordingly the ALJ's decision became the final decision of the Commission. See 30 U.S.C. 823(d)(1).

3. The court of appeals affirmed. Pet. App. 1a-9a. The court reasoned, first, that "the statutory term 'affecting . . . commerce,' . . . when unqualified, signal[s] Congress' intent to invoke its full authority under the Commerce Clause." Pet. App. 5a (quoting *Jones* v. *United States*, 529 U.S. 848, 854 (2000)) (alterations in original). Second, it noted that Congress expressly found that "'the disruption of production and the loss of income' caused by mining accidents and mining-related illnesses" impede and burden commerce, including by restricting the growth of the coal-mining industry. *Id.* at 5a-6a (citing 30 U.S.C. 801(c), (d) and (f)). Those congressional findings, the court observed, support the ALJ's conclusion that Congress chose "to regulate the business of mining because of the nature of mining activity and not because of the business economics that determine the geographic service area of a particular mine." *Id.* at 6a. Finally, the court noted that the Act's legislative history confirms that Congress intended to exercise the full extent of its commerce power when it enacted the Mine Act. See *id.* at 6a-7a.

The court further concluded that the Commerce Clause permits Congress to regulate mines whose products are sold entirely intrastate. Pet. App. 7a-8a. The court observed that "the Supreme Court has long held that the Commerce Clause does not preclude Congress from regulating the activities of an economic actor whose products do not themselves enter interstate commerce, where the activities of such local actors taken together have the potential

to affect an interstate market the regulation of which is within Congress's power." *Id.* at 7a-8a (citing *Wickard* v. *Filburn*, 317 U.S. 111 (1942)).

ARGUMENT

Petitioner challenges the court of appeals' conclusion that the Mine Act applies to its mine.[2] The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. Relying on the canon of constitutional doubt and this Court's decisions in *Jones* v. *United States*, 529 U.S. 848 (2000), and *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001), petitioner contends that the Mine Act should not be interpreted to authorize federal regulation of mines that sell their products exclusively to intrastate buyers. Petitioner acknowledges (Pet. 2), as it must, that words like "affect commerce," 30 U.S.C. 803, which Congress employed in defining the coverage of the Mine Act, generally invoke the full sweep of Congress's power under the Commerce Clause.[3] Petitioner nonetheless asserts (Pet. 4-6)

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[2] Petitioner has not renewed, in this Court, its contention that Congress lacks the power under the Commerce Clause to regulate its mine.

[3] See *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (the terms "'affecting commerce' . . . [are] words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power"); *Jones* v. *United States*, 529 U.S. 848, 854 (2000) ("term[s] 'affecting . . . commerce,' * * * when unqualified, signal Congress' intent to invoke its full authority under the Commerce Clause"); see also *NLRB* v. *Reliance Fuel Oil Corp.*, 371 U.S. 224, 226 (1963) (per curiam); *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 273 (1995); *Russell* v. *United States*, 471 U.S. 858, 859 & n.4 (1985); *Scarborough* v. *United States*, 431 U.S. 563, 571-572

that Congress in the Mine Act "qualified" the words "affect commerce" by twice using the phrase "products of which." Petitioner thus argues (Pet. 7) that the Mine Act does not apply to a mine unless the products of that mine "affect commerce" in that they are sold across state lines.

Petitioner's argument founders on the text of Section 4 of the Mine Act. That section establishes that the Mine Act applies to "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce." 30 U.S.C. 803. As an initial matter, petitioner's proposed interpretation of Section 4, under which a mine is not covered by the Act unless its products *enter* interstate commerce, would render superfluous the entire second clause of that Section, which provides coverage over "[e]ach coal or other mine, * * * the operations or products of which *affect* commerce." 30 U.S.C. 803 (emphasis added). Petitioner's interpretation thus contravenes a fundamental rule of statutory construction. See, *e.g.*, *Carter* v. *United States*, 530 U.S. 255, 262 (2000).

In addition, petitioner's exclusive focus on the statutory phrase "products of which"overlooks the fact that the statutory text does not limit the Mine Act's jurisdictional sweep on the basis of the "qualifying words" cited by petitioner, but instead unambiguously extends the Act to every mine "the *operations* * * * of which affect commerce." 30 U.S.C. 803 (emphasis added). As Congress was well aware, that language reflected an intent, in light of this Court's cases, to invoke the full jurisdictional authority that Congress possesses under the Commerce Clause. See *Polish Nat'l Alliance* v. *NLRB*, 322 U.S. 643, 647 (1944) ("[W]hen [Congress] wants to bring aspects of commerce within the

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(1977); *United States* v. *American Bldg. Maint. Indus.*, 422 U.S. 271, 280 (1975).

full sweep of its constitutional authority, it manifests its purpose by regulating not only 'commerce' but also matters which 'affect,' 'interrupt,' or 'promote' interstate commerce.").

The congressional findings and declaration of purpose set forth in the Mine Act confirm Congress's intent to exercise the full scope of its commerce power. In adopting the Act, Congress recognized "an urgent need to * * * impro e] the working conditions and practices in the Nation's coal or other mines" because "the disruption of production and the loss of income" caused by mining accidents and mining-caused diseases "unduly impedes and burdens commerce." 30 U.S.C. 801 (c) and (f). Congress further found that "the existence of unsafe and unhealthful conditions and practices in the Nation's coal or other mines * * * cannot be tolerated" because it constitutes a "serious impediment to the future growth of the coal or other mining industry." 30 U.S.C. 801(d); see *Donovan* v. *Dewey*, 452 U.S. 594, 602 (1981) ("Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce.").

Because the text of the Mine Act clearly expresses Congress's intent to exercise the full scope of its commerce power in regulating the mining industry, it follows that the Act applies to petitioner's mine. Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States," U.S. Const. Art. I, § 8, Cl. 3, and Congress has corresponding authority under the Necessary and Proper Clause, *id.* Cl. 18, to pass legislation that constitutes a reasonable means to effectuate the regulation of interstate commerce. "Congress' commerce authority includes the power to regulate those activities having a sub-

stantial relation to interstate commerce, . . . *i.e.*, those activities that substantially affect interstate commerce." *United States* v. *Morrison*, 529 U.S. 598, 609 (2000) (quoting *United States* v. *Lopez*, 514 U.S. 549, 558-559 (1995)). Thus, it has long been established that "[t]he power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." *United States* v. *Darby*, 312 U.S. 100, 118 (1941); accord *Wickard*, 317 U.S. at 124 (quoting *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)); see *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937) ("[T]he power to regulate commerce is the power to enact 'all appropriate legislation' for 'its protection and advancement.'") (citing *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 564 (1870)). The congressional findings contained in the Mine Act, discussed above, show that Congress chose to regulate the economic activity of mining to ensure the safety of those who work in the mining industry, an issue that, Congress found, has a direct effect on interstate commerce. 30 U.S.C. 801. Accordingly, the Mine Act applies to petitioner's mine, even though the products of that mine are not sold to customers in other states, because the economic activity of mining substantially affects interstate commerce. See *United States* v. *Lake*, 985 F.2d 265, 269 (6th Cir. 1993) (concluding that the Mine Act was a constitutional exercise of the commerce

power as applied to a small mine whose sales of coal were entirely local).[4]

2. Contrary to petitioner's view, the court of appeals' decision in this case does not conflict with this Court's decisions in *Jones* v. *United States*, 529 U.S. 848 (2000), and *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, 531 U.S. 159 (2001). *Jones* involved a federal arson statute covering buildings "used * * * in any activity affecting interstate * * * commerce," 18 U.S.C. 844(i). See 529 U.S. at 854. Emphasizing that the "key word [in that statutory formulation] is 'used,'" *ibid.*, the Court held that a building used by its owner as a private residence was not used in any activity affecting commerce, *id.* at 859. Nothing in *Jones* suggests that a commercial mining operation should be excluded from Mine Act coverage because its products are sold solely intrastate. The Mine Act does not contain the key limiting term "used"; rather, its provisions apply to every mine "the operations or products of which affect commerce." 30 U.S.C. 803. Moreover, *Jones* did not disturb the holding of *Russell* v. *United States*, 471 U.S. 858, 862 (1985), which concluded that Section 844(i) applies to a building used as a rental property. See *Jones*, 529 U.S. at 853. The rental property in *Russell* presents a much closer analogy to peti-

[4] Even if a particularized connection between petitioner's operations and interstate commerce were required, that connection would exist here. Petitioner's operations affect interstate commerce because, as the ALJ found, Pet. App. 13a, petitioner uses equipment purchased from suppliers in other states. Cf. *Katzenbach* v. *McClung*, 379 U.S. 294, 304 (1964) (holding in a case involving Title II of the Civil Rights Act of 1964, 42 U.S.C. 2000a, that a restaurant affected interstate commerce because a substantial portion of the food it served came from out of state). Additionally, petitioner's products are used for a variety of construction projects, which the ALJ indicated could have "multi-state consequences." Pet. App. 13a.

tioner's mine, a commercial enterprise, than does the owner-occupied private dwelling in *Jones*.

In *SWANCC*, the Court refused to "hold[] that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under [the Clean Water Act's] definition of 'navigable waters' because they serve as habitat for migratory birds." 531 U.S. at 171-172. The Court also stated that, even if the meaning of "navigable waters" in the Clean Water Act were not plain, it would not defer to the Army Corps of Engineers' interpretation of the phrase "navigable waters" as encompassing the abandoned sand and gravel pit at issue there, because deferring to the Corps would raise a grave and doubtful constitutional question. See *id.* at 172-174. Here, by contrast, the text of the Mine Act unambiguously covers petitioner's mine; thus, there is no need for this Court to consider whether deference is appropriate. As explained above, moreover, application of the Mine Act to petitioner's commercial enterprise does not raise a serious constitutional question. Thus, the decision below is fully consistent with *Jones* and *SWANCC*.[5]

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[5] Petitioner criticizes (Pet. 5-8) the court of appeals' reliance on a committee report construing the Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290, which amended the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742. (Section 4 of the 1969 Act, as amended, is at issue in this case.) Because the text of the Mine Act unambiguously establishes that it applies to commercial mines like petitioner's, there is no need for this Court to consider the Act's legislative history. *E.g.*, *Department of Housing & Urban Dev.* v. *Rucker*, 535 U.S. 125, 132 (2002) ("reference to legislative history is inappropriate when the text of the statute is unambiguous").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 04-978

IN THE

Supreme Court of the United States

D.A.S. SAND & GRAVEL, INC.,

Petitioner,

v.

ELAINE L. CHAO, United States Secretary of Labor,
MINE SAFETY & HEALTH ADMINISTRATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner's corporate disclosure statement was set forth at page *ii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

The Respondent's Brief and the Second Circuit Court of Appeals opinion both erroneously assume that Congress intended to invoke the outer limits of its power under the Commerce Clause in the "Mine Act". Their conclusions are based on committee reports and "statutory text". These valiant efforts to stretch the intended reach of the statute fail when the statute is simply read as it is written.

Congress made a separate section of the *Mine Act* titled "*Mines subject to Coverage*". What could be more clear as to the intent of Congress regarding mines subject to the act, then a section titled "Mines subject to the Act"?

Congress was well aware that the statutory term "affecting commerce", when unqualified, indicates their desire to invoke the outer limits of their power, instead Congress qualified the statutory term in the Mine Act. Congress *did not* indicate mines which affect commerce are subject to the Mine Act. If that was intended by Congress, it would have been simple to write the statute in that fashion. Congress did not.

Congress qualified that portion of the statute specifically titled as to which "Mines are subject to the Act". The statute indicates "each . . . mine, *the products of* which enter commerce or th. *operations or products of which* affect commerce . . ." (Qualifying words emphasized).

These qualifying words are not buried somewhere in a huge statute. They are in the descriptive section of the statute titled "Mines subject to the Act." Why would Congress restrict a known statutory term in that section and attempt to undo this restriction in committee reports and other parts of the statute, as argued by respondent?

The committee reports and statute text cited by respondent and the Second Circuit do not conflict with an interpretation of the statute that does not invoke the full extent of Congress' power. The "unhealthful conditions and practices of the coal and other mines" whose products affect commerce will still be regulated. If the statute is applied as written, only small intrastate mines such as petitioners would not be regulated. This lack of regulation for such small intrastate operations would not prevent any of the statute's goals from being attained. In fact, the regulatory Agency MSHA does not regulate every mine. Instead of limiting its regulatory reach as directed by the statute, they have limited their activities by the equipment owned and used by an operator. A multiple deck screen operation is regulated, when a single deck screen is not. I fail to find these restrictions in the statute.

This court clearly emphasized in *Solid Waste Agency of Northern Cook County v. United States Army Corps. of Engineers*, 531 U.S. 159 (2001) (SWANCC); and *Jones v. United States*, 529 U.S. 848 (2000) (*Jones)* that "affect commerce" is a well known statutory term. Both cases emphasize that if the statutory term is qualified then the qualifying words must be given meaning or explained. Neither respondent, nor the Second Circuit give the qualifying words in the Mine Act meaning.

In *SWANCC*, the Chief Justice notes the burden put on respondent's interpretation of the statute:

> where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expert a clear result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative

agencies to interpret a statute to push the limit of Congressional authority.

When the requirement of a clear indication that Congress intended to invoke its outer limits of power is coupled with the requirement that words qualifying the statutory term "affects commerce" must be given meaning, it is clear petitioner's interpretation of the statute must fail. In addition the Second Circuit in its opinion completely ignores the burden discussed in *SWANCC* and ignores the qualifying words of the statute, in contradiction of both *Jones* and *SWANCC*.

The Second Circuit in its opinion gives no meaning to the qualifying words in the Mine Act. This is in direct contradiction of both of this court's decisions in *SWANCC* and *Jones*. Certiorari should be granted so that this Court can correct this error. The Second Circuit's opinion will be cited by other agencies attempting to extend their reach beyond what was authorized by Congress.

The Second Circuit's opinion also attempts to invoke the full extent of Congress' power under the commerce clause in the Mine Act, even though the statute qualifies the statutory term required for such an interpretation. The Second Circuit's opinion does not apply the requirement discussed by the Chief Justice in *SWANCC* that there is a clear indication that Congress wishes to invoke its full power under the commerce clause. These errors justify this Court granting certiorari to avoid confusion among the different circuits and to give the decisions of *SWANCC* and *Jones* the authority that was intended.

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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